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PTO/SB/21 (09-04)

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## TRANSMITTAL FORM

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Total Number of Pages in This Submission

7

Application Number	10/775,634
Filing Date	02/10/2004
First Named Inventor	Jon D. Pearson
Art Unit	3671
Examiner Name	Tara L. Mayo
Attorney Docket Number	JPA-1

### ENCLOSURES (Check all that apply)

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| <input checked="" type="checkbox"/> Fee Transmittal Form<br><input checked="" type="checkbox"/> Fee Attached<br><input type="checkbox"/> Amendment/Reply<br><input type="checkbox"/> After Final<br><input type="checkbox"/> Affidavits/declaration(s)<br><input type="checkbox"/> Extension of Time Request<br><input type="checkbox"/> Express Abandonment Request<br><input type="checkbox"/> Information Disclosure Statement<br><br><input type="checkbox"/> Certified Copy of Priority Document(s)<br><input type="checkbox"/> Reply to Missing Parts/<br>Incomplete Application<br><input type="checkbox"/> Reply to Missing Parts<br>under 37 CFR 1.52 or 1.53 | <input type="checkbox"/> Drawing(s)<br><input type="checkbox"/> Licensing-related Papers<br><br><input type="checkbox"/> Petition<br><input type="checkbox"/> Petition to Convert to a<br>Provisional Application<br><input type="checkbox"/> Power of Attorney, Revocation<br>Change of Correspondence Address<br><br><input type="checkbox"/> Terminal Disclaimer<br><br><input type="checkbox"/> Request for Refund<br><br><input type="checkbox"/> CD, Number of CD(s) _____<br><input type="checkbox"/> Landscape Table on CD | <input type="checkbox"/> After Allowance Communication to TC<br><br><input type="checkbox"/> Appeal Communication to Board<br>of Appeals and Interferences<br><br><input checked="" type="checkbox"/> Appeal Communication to TC<br>(Appeal Notice, Brief, Reply Brief)<br><br><input type="checkbox"/> Proprietary Information<br><br><input type="checkbox"/> Status Letter<br><br><input checked="" type="checkbox"/> Other Enclosure(s) (please identify<br>below):<br>Credit Card Charge Form for \$250 Reply<br>Brief filing fee (small entity); and Return<br>Mailroom Postcard, under Express Mail Label<br>No. EV862359206US. |
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Remarks

### SIGNATURE OF APPLICANT, ATTORNEY, OR AGENT

Firm Name	AQUILLA PATENTS & MARKS, PLLC		
Signature			
Printed name	Thomas T. Aquilla		
Date	January 4, 2006	Reg. No.	43,473

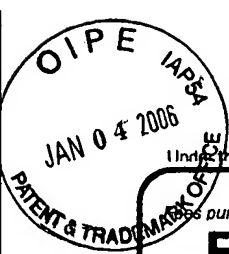
### CERTIFICATE OF TRANSMISSION/MAILING

I hereby certify that this correspondence is being facsimile transmitted to the USPTO or deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on the date shown below:

Signature			
Typed or printed name	Thomas T. Aquilla	Date	January 4, 2006

This collection of information is required by 37 CFR 1.5. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11 and 1.14. This collection is estimated to 2 hours to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

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Effective on 12/08/2004.

Pursuant to the Consolidated Appropriations Act, 2005 (H.R. 4818).

**FEE TRANSMITTAL**  
**For FY 2005**☒ Applicant claims small entity status. See 37 CFR 1.27

TOTAL AMOUNT OF PAYMENT (\$) 250.00

**Complete if Known**

Application Number	10/775,634
Filing Date	02/10/2004
First Named Inventor	Jon D. Pearson
Examiner Name	Tara L. Mayo
Art Unit	3671
Attorney Docket No.	JPA-1

**METHOD OF PAYMENT (check all that apply)**☐ Check ☒ Credit Card ☐ Money Order ☐ None ☐ Other (please identify): \_\_\_\_\_☐ Deposit Account Deposit Account Number: \_\_\_\_\_ Deposit Account Name: \_\_\_\_\_

For the above-identified deposit account, the Director is hereby authorized to: (check all that apply)

☐ Charge fee(s) indicated below ☐ Charge fee(s) indicated below, except for the filing fee☐ Charge any additional fee(s) or underpayments of fee(s) under 37 CFR 1.16 and 1.17 ☐ Credit any overpayments**WARNING:** Information on this form may become public. Credit card information should not be included on this form. Provide credit card information and authorization on PTO-2038.**FEE CALCULATION****1. BASIC FILING, SEARCH, AND EXAMINATION FEES**

Application Type	FILING FEES		SEARCH FEES		EXAMINATION FEES		Fees Paid (\$)
	Fee (\$)	Small Entity Fee (\$)	Fee (\$)	Small Entity Fee (\$)	Fee (\$)	Small Entity Fee (\$)	
Utility	300	150	500	250	200	100	
Design	200	100	100	50	130	65	
Plant	200	100	300	150	160	80	
Reissue	300	150	500	250	600	300	
Provisional	200	100	0	0	0	0	

**2. EXCESS CLAIM FEES**

Fee Description	Fee (\$)	Small Entity Fee (\$)
Each claim over 20 (including Reissues)	50	25
Each independent claim over 3 (including Reissues)	200	100
Multiple dependent claims	360	180

<b>Total Claims</b>	<b>Extra Claims</b>	<b>Fee (\$)</b>	<b>Fee Paid (\$)</b>	<b>Multiple Dependent Claims</b>
- 20 or HP = _____	x _____	= _____		<b>Fee (\$)</b> <b>Fee Paid (\$)</b>

HP = highest number of total claims paid for, if greater than 20.

<b>Indep. Claims</b>	<b>Extra Claims</b>	<b>Fee (\$)</b>	<b>Fee Paid (\$)</b>
- 3 or HP = _____	x _____	= _____	

HP = highest number of independent claims paid for, if greater than 3.

**3. APPLICATION SIZE FEE**

If the specification and drawings exceed 100 sheets of paper (excluding electronically filed sequence or computer listings under 37 CFR 1.52(e)), the application size fee due is \$250 (\$125 for small entity) for each additional 50 sheets or fraction thereof. See 35 U.S.C. 41(a)(1)(G) and 37 CFR 1.16(s).

<b>Total Sheets</b>	<b>Extra Sheets</b>	<b>Number of each additional 50 or fraction thereof</b>	<b>Fee (\$)</b>	<b>Fee Paid (\$)</b>
- 100 = _____	/ 50 = _____	(round up to a whole number) x _____	= _____	

**4. OTHER FEE(S)**

Non-English Specification, \$130 fee (no small entity discount)

Other (e.g., late filing surcharge): Appeal Reply Brief filing fee (small entity) **Fees Paid (\$)** \$250.00**SUBMITTED BY**

Signature	<u>Thomas T. Aquilla</u>	Registration No. (Attorney/Agent)	43,473	Telephone	603-253-9474
Name (Print/Type)	THOMAS T. AQUILLA	Date	1/4/2006		

This collection of information is required by 37 CFR 1.136. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.14. This collection is estimated to take 30 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

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APPLICATION SER. NO. 10/775,634  
ATTORNEY DOCKET NO. JPA-1  
EXPRESS MAIL LABEL NO. EV862359206US

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

Inventor: Jon D. Pearson

Serial No: 10/775,634

Filing Date: 02/10/2004

Title: INFLATABLE DEVICE FOR  
ADJUSTING THE SUPPORT  
AND COMFORT OF A  
MATTRESS

Group Art Unit: 1328

Examiner: Tara L. Mayo

**REPLY BRIEF**

MAIL STOP APPEAL BRIEF - PATENTS  
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Alexandria, VA 22313-1450

**REPLY BRIEF UNDER 37 C.F.R. § 1.193(b)(1)**

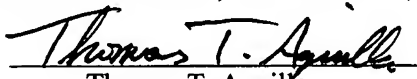
This application is on appeal from the Final Rejection by the Examiner dated May 18, 2005, wherein claims 1-18 were finally rejected. This Brief supports the appeal to the Board of Patent Appeals and Interferences in the above-captioned application.

Under 37 C.F.R. § 1.193(b)(1), Appellant may file a Reply Brief directed to new points of argument raised in the Examiner's Answer, within two months of the date of such Answer. Appellant hereby submits its Reply Brief, in response to the new points of argument raised in the Examiner's Answer, which was mailed on November 4, 2005.

Pursuant to 37 C.F.R. § 1.193(b)(1), the two-month period for filing a Reply Brief tolls from the date of mailing of the Examiner's Answer, *i.e.*, November 4, 2005. Thus, this Reply Brief is timely filed within the two-month period, which extends until January 4, 2006.

**CERTIFICATE OF MAILING**

I hereby certify that this correspondence is being deposited in the U.S. Postal Service as **Express Mail No. EV862359206US** in an envelope addressed to Mail Stop Appeal Brief - Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450, on January 4, 2006.

  
Thomas T. Aquilina

## NEW POINTS RAISED IN EXAMINER'S ANSWER

In the Examiner's Answer, the Examiner states that:

1) The Declaration under 37 C.F.R. § 1.132 filed 25 January 2005 is insufficient to overcome the rejection of claims 1, 7 and 13 based upon Gordon '898 applied under 35 U.S.C. § 102(e) as set forth in the Final Office Action, because the Examiner maintains that **"a declaration under 37 C.F.R. § 1.132 can only be used to overcome a provisional rejection under 35 U.S.C. § 102(e) to show that the claimed invention is not by another."** Examiner's Answer at page 10, lines 11-15. Appellant respectfully disagrees and requests reconsideration.

An affidavit or declaration of prior invention is properly submitted under 37 C.F.R. § 1.131 (*i.e.*, not 1.132). However, Appellant's declaration was submitted under 37 C.F.R. § 1.132, not to show prior invention, but rather to provide evidence in support of a traversal of the outstanding rejections in the Final Office Action. Under 37 C.F.R. § 1.132, when any claim of an application or a patent under reexamination is rejected or objected to, any evidence submitted to traverse the rejection or objection on a basis not otherwise provided for must be by way of an oath or declaration under this section. Indeed, Appellant submitted the Declaration specifically to traverse the outstanding rejections, as required by 37 C.F.R. § 1.132. Therefore, Appellant respectfully submits that the Declaration under 37 C.F.R. § 1.132 filed 25 January 2005 is entirely proper for the express purpose of traversing the outstanding rejections, and Appellant maintains that the Declaration is sufficient on its face to overcome the rejection of claims 1, 7 and 13. Reconsideration is thus respectfully requested.

In the Examiner's Answer, the Examiner further states that:

2) The Supplemental Declaration under 37 C.F.R. § 1.132 filed 18 July 2005 is insufficient to overcome the rejection of claims 1-18 based upon Gordon '898, Reeder *et al.* '209 and Pepe '531 as set forth in the Final Office Action, because the Examiner maintains that **"it was not timely presented. A declaration under 37 CFR 1.132 filed after final rejection will only be considered timely if submitted (i) with a first reply after final rejection for the purpose of overcoming anew ground of rejection or requirement made in the final rejection, or (ii) with a satisfactory showing under 37 CFR 1.116(b) or 37 CFR 1.195 or 37 CFR 1.129(a)."** Examiner's Answer at page 10,

lines 16-22 (emphasis added). Appellant hereby submits the required showing under 37 C.F.R. § 1.116(b) and 37 C.F.R. § 1.195, and thus respectfully requests reconsideration.

Under 37 C.F.R. § 1.116(b), after a final rejection, an amendment touching the merits of the application or patent under reexamination may be admitted upon a showing of good and sufficient reasons why the amendment is necessary and was not earlier presented. Under 37 C.F.R. § 1.195, affidavits, declarations, or exhibits submitted after the case has been appealed will not be admitted without a showing of good and sufficient reasons why they were not earlier presented.

Appellant respectfully submits that the Supplemental Declaration under 37 C.F.R. § 1.132, filed 18 July 2005, is necessary because it disproves the Examiner's unsupported assertions in the Final Office Action, and was not presented earlier because the evidence was not available prior to its submission on 18 July 2005. More particularly, upon receiving the Final Office Action, Appellant immediately proceeded to obtain the prior art device of Gordon and performed extensive tests on the apparatus, including actual laboratory tests designed to address the Examiner's assertions in the Final Office Action. These laboratory data were provided in the Supplemental Declaration in direct response to the Examiner's assertions in the Final Rejection, specifically to traverse the rejections in the Final Office Action, by showing that the apparatus of Gordon does not and indeed cannot meet the limitations of the rejected claims. Appellant provided the evidence in the Supplemental Declaration immediately upon completion of the laboratory testing of Gordon's patented device, therefore, the evidence could not have been presented earlier, precisely because it did not yet exist.

Appellant respectfully submits that the foregoing constitutes a showing of good and sufficient reasons why the Supplemental Declaration filed 18 July 2005 was not earlier presented, in compliance with 37 C.F.R. § 1.116(b). Reconsideration and entry of the Supplemental Declaration are therefore respectfully requested.

### **CONCLUSION**

Appellant maintains that reconsideration and entry of the Supplemental Declaration should result in a determination that all of the pending claims are patentable over the prior art of record. Appellant therefore respectfully requests entry of the

Supplemental Declaration and further submits that its entry should result in the re-opening of prosecution and the issuance of a Notice of Allowance, as the Supplemental Declaration clearly shows that the pending claims are free and clear of the prior art. Such action is therefore respectfully requested.

Respectfully submitted,  
Jon D. Pearson

Dated: 1/4/2006

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